IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROBERT C. MARSLETTE, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 00-816-SLR
	)	
DAN GLICKMAN, or his successor, in his capacity as Secretary of the U.S. Department of Agriculture,	)	
	)	
Defendant.	)	

Paul G. Enterline, Esquire, Georgetown, Delaware. Counsel for Plaintiff.

Carl Schnee, United States Attorney and Patricia C. Hannigan, Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Counsel for Defendant.

MEMORANDUM OPINION

Dated: March 26, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Robert C. Marslette, Jr. filed this action against defendant Dan Glickman, in his capacity as Secretary of the United States Department of Agriculture ("USDA"), on September 6, 2000. (D.I. 1) Plaintiff seeks judicial review, pursuant to 7 CFR § 11.13, of a decision by the USDA denying his request to enroll land in the Conservation Reserve Program ("CRP") under 7 CFR § 1410. Currently before the court is plaintiff's motion for summary judgment (D.I. 16) and defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), or in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 12(b)(6). (D.I. 19) Because the parties presented matters outside the pleadings, the court will review the motion to dismiss as a motion for summary judgment. For the reasons that follow, the court shall grant defendant's motion for summary judgment and deny plaintiff's motion.

II. BACKGROUND

In 1985, Congress established CRP to encourage owners of highly erodible lands with eligible cropping histories to take those lands out of agriculture production in order to "conserve and improve the soil and water resources of farmlands." 16 U.S.C. §§ 3801, 3831-3832; Strong v. Glickman, 50 F. Supp. 2d 1, 2 (D.D.C. 1999). Farmers must agree to "implement a plan ... for converting eligible lands normally devoted to the production of

an agricultural commodity on the land ... to a less intensive use," 16 U.S.C. § 3832(a)(1), and in return for taking the land out of production, farmers receive annual payments. See id. at §§ 3833(2)(A), 3834(c)(2)(A); 7 C.F.R. § 704.2(a)(4).

In October 1990, plaintiff submitted a conservation plan for his Missouri farm to the Department of Agriculture and Soil Conservation Service. (D.I. 11; CA-00-509-SLR; D.I. 16; Administrative Record ("A.R.")) This plan created 9.1 acres of grass strips and 1.7 acres of waterways. (Id.)

On January 12, 1999, plaintiff applied to enter the subject 10.8 acres into the CRP. (D.I. 16) The FSA determined that the land was not eligible and denied enrollment. (A.R. 7) Upon reconsideration, the FSA affirmed its prior decision, stating that crop reports from 1994-1998 showed the subject land was in the form of grass strips and grass waterways, which did not qualify for the CRP program. (A.R. 49) Plaintiff appealed this decision to the National Appeals Division ("NAD"). (A.R. 333) In October 1999, the NAD Hearing Officer conducted an evidentiary hearing, pursuant to 7 U.S.C. § 6991-7002.[1] (Id.) On February 29, 2000 the Hearing Officer issued a decision denying

[1]Plaintiff concluded his presentation on October 7, 1999. Due to time restrictions, the hearing was continued on October 22, 1999. During the continued hearing, plaintiff would not permit the Agency Representative to give the Agency presentation. The Hearing Officer concluded the hearing and treated the remainder of this case as a record review. (Id.)

plaintiff's enrollment in the CRP. (A.R. 336) In consideration of the entire record, the Hearing Officer made the following findings of fact:[2]

1. The Appellant applied for CRP on 10.8 acres for farm #1565, tract #680. The Conservation Reserve Program Worksheet, signed by the Appellant on January 12, 1999, shows no report on this acreage for the crop years 1994 through 1998.

2. The farm in question (#1565) totals approximately 120 acres.

3. The reports of acreage for 1994 through 1998 never show more than approximately 108 acres of land on farm #1535 [sic] as enrolled in CRP.

4. The County Committee reviewed the Appellant's 1994 through 1998 crop reports.

(A.R. 334, 335)

Plaintiff appealed this decision to the Director of the NAD, who upheld the NAD's determination that the land was ineligible. (A.R. 330-332) Plaintiff has initiated the current action for review of the final NAD decision under the Administrative Procedures Act.

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[2]As indicated in the "Notice of Record Review" the record was to be closed on December 22, 1999. Plaintiff continued to send documentation to the Hearing Officer and the Assistant Director, NAD Eastern Regional Office. The Assistant Director forwarded the documentation to the Hearing Officer. Because the documents sent to the Assistant Director were marked separately from those sent to the Hearing Officer, they could not be considered accurate reproductions. However, because plaintiff has alleged the Agency withheld information favorable to him, the Hearing Officer included the documents sent to the Assistant Director. Therefore, the record remained opened through January 30, 2000. (A.R. 333)

III. STANDARD OF REVIEW

Judicial review of a decision made by the Director of the NAD is governed by the Administrative Procedures Act ("APA"). See Lane v. United States Department of Agriculture, 120 F.3d 106, 108-09 (8th Cir. 1997). The APA states that an agency's decision, including its action, findings and conclusions, should not be overturned unless it is unsupported by substantial evidence, or if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 5 U.S.C. § 706(2); United States v. Snoring Relief Labs Inc., 210 F.3d 1081, 1085 (9th Cir. 2000). The scope of review is a narrow one and the court should not substitute its judgment for that of the agency. Motor Vehicle Mfrs. Assn. v. State Farm Mutual, 463 U.S. 29, 43 (1983).

Before the court are the parties' cross-motions for summary judgment. (D.I. 16, 19). A party is entitled to summary judgment only when the court concludes "that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no material issue of fact is in dispute. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). Once the moving party has carried

its initial burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). "Facts that could alter the outcome are 'material', and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assur. Co., 57 F.3d 300, 302 n.1 (3rd Cir. 1995). If the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The mere existence of some evidence in support of the party will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that factual issue. See Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249 (1986). The court, however, must "view all the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3rd Cir. 1995); Pacitti v. Macy's, 193 F.3d 766, 772 (3rd Cir. 1999).

IV. DISCUSSION

Plaintiff contends that the NAD Director's determination violates the APA, 5 U.S.C. § 706(2)(a), in that it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. (D.I. 9) Plaintiff's primary contention is that defendant's determination was not fact-based, as he failed to take into account that the subject acreage was "considered planted" by the FSA in an agricultural commodity, which would qualify it for the CRP program. (D.I. 23)

The applicable statutory language governing CRP eligibility provides:

> (a) In order to be eligible to be placed in the CRP, land:
> (1) Must be cropland that:
> (i) Has been annually planted or considered planted to an agricultural commodity in 2 of the 5 most recent years, as determined by the Deputy Administrator, provided further that field margins which are incidental to the planting of crops may also be considered qualifying cropland to the extent determined appropriate by the Deputy Administrator; and
> (ii) Is physically and legally capable of being planted in a normal manner to an agricultural commodity, as determined by the Deputy Administrator."

7 C.F.R. § 1410.6. Additionally, existing grass waterways are ineligible acreage. FSA handbook 2-CRP (Rev. 3) Para. 82H; A.R. 28.

Defendant argues that the NAD Director's determination is proper. (D.I. 20, 24) Plaintiff's land simply did not meet the criteria for eligibility because the land offered for enrollment: (1) had not been planted in an agricultural commodity during any

two of the crop years between 1994 and 1998; (2) was not physically and legally capable of being planted in a normal manner to an agricultural commodity; and (3) has been an existing grass waterway for years. (Id.)

A. The Land Had Not Been Planted in an Agricultural Commodity During Any Two of the Crop Years Between 1994 and 1998.

Plaintiff challenges the NAD Director's determination that the subject acreage had not been planted in an agricultural commodity during any two of the crop years between 1994 and 1998. (D.I. 16) He claims that the information contained in his enrollment worksheet is erroneous. (Id.) He also claims that the land met the requirements of 7 C.F.R. § 1410.6(a)(1) because it was "considered planted" in corn by the FSA for at least two years prior to 1999. (Id.) Plaintiff refers to the FSA handbook which states: "Acreage that received planted or considered planted credit for [crop acreage base] CAB protection is considered planted for purposes of CRP cropland eligibility." FSA handbook 2-CRP (Rev. 3) Para. 82A; A.R. 24.

Plaintiff's allegations are not supported by the record. In determining that the land was ineligible for the CRP, defendant relied on the CRP enrollment worksheet submitted by plaintiff which showed a lack of cropping history for crop years 1994 through 1998. (A.R. 292, 293) Because plaintiff resided in Delaware and the land was located in Missouri, he could not apply

to the program at the local FSA office. (D.I. 16) The local FSA office sent an application form for plaintiff to sign and return. (Id.) Upon receipt of the signed form, the local FSA staff reviewed crop reports and aerial photographs of plaintiff's farm. (A.R. 49, 292, 293, 368) They reported that the land lacked cropping history for crop years 1994 through 1998. (Id.)

Plaintiff contends that the land was "considered planted" in corn by the FSA for at least two years prior to 1999. (D.I. 16) A Detail Tract Crop Information Worksheet for crop year 1998 shows 9.1 of the subject acres listed as "[C]orn Tract PFC Acres", defined as "Production Flexibility Contract acres formally known as CABs". (A.R. 250) However, CRP eligibility requires land to be "planted or considered planted" for at least two years. 7 C.F.R. § 1410.6(a)(1)(i) This one crop report submitted by plaintiff is insufficient to meet this CRP eligibility requirement.

Plaintiff cites to a June 1996 PFC contract as evidence of CRP eligibility. (A.R. 259) According to the contract, plaintiff is a producer of corn for 11.7 acres, and as long as he abides by the terms contained therein, he is to receive compensation for crop years 1996 through 2002. (Id.) This document does not identify the specific tract to which the contract pertains, nor does it show that plaintiff actually received compensation during the stated years. Thus, it is

insufficient to establish that the subject acres were "planted or considered planted" as per CRP eligibility requirements.

Plaintiff also refers to documents which show acreage designated as [Conserving Use/Planted or Considered Planted] CUPCP for crop years 1994 and 1995, claiming that they demonstrate CRP eligibility based upon this "planted or considered planted" designation. (A.R. 252-258) However, a January 9, 1996 memo from the local FSA to plaintiff states: "[L]and designated CUPCP does not meet this eligibility requirement." (A.R. 75) Plaintiff's documents are insufficient to meet the CRP eligibility requirement of "planted or considered planted."[3]

Plaintiff has failed to establish that the information contained in his CRP enrollment worksheet is erroneous or that the subject land meets the CRP eligibility requirement of "planted or considered planted." Since the defendant's decision regarding plaintiff's cropping history is rationally based on the administrative record, there is no evidence that defendant acted arbitrarily in denying plaintiff's enrollment into the CRP.

B. The Land Was Not Physically and Legally Capable of Being Planted in a Normal Manner to an Agricultural Commodity

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[3]Defendant noted that even if the CUPCP designation was sufficient to meet the CPR eligibility requirement of "planted or considered planted," the land is ineligible due to other criteria. (D.I. 20)

The second criteria for eligibility into the CRP is that the land must be physically and legally capable of being planted in a normal manner to an agricultural commodity, as determined by the Deputy Administrator. 7 C.F.R. § 1410.6(a)(1)(ii). Plaintiff has failed to demonstrate that his land meets this second criteria.

An October 9, 1990 "Record of Decisions and Application" outlining plaintiff's conservation plan for his farm designates 9.1 of the subject acres as "sodbust". (A.R. 260) According to defendant, planting a crop in this acreage is likely to constitute "sodbusting," an illegal activity which would cause plaintiff to lose benefits from all FSA programs.[4] (D.I. 20) Plaintiff has failed to provide any evidence to dispute defendant's argument. The court finds no evidence that defendant acted arbitrarily in denying plaintiff's enrollment into the CRP because the land was not physically and legally capable of being planted in a normal manner to an agricultural commodity.

C. The Subject Land Has Been an Existing Grass Waterway

Existing grass waterways are ineligible for enrollment in CRP. FSA handbook, 2-CRP (Rev. 3) Para. 82H; A.R. 28. Plaintiff contends that there was never a determination by the defendant

[4]Defendant also notes that the land is not capable of being planted normally because of its shape, small size and slope, however, there are no documents of record cited to support this determination. (Id.)

that the subject acres were "waterways," and that the land is predominantly "grass buffer strips" planted pursuant to his conservation plan. (D.I. 23)

Defendant relied on the CRP enrollment worksheet in determining that the subject acreage was ineligible for the CRP because it consisted of grass waterways. Documented on this worksheet is the following: "Waterways are established waterways. They were seeded to grass many years ago and land use has not been reported. No eligible cropping history." (A.R. 30) This determination is further supported by aerial photographs of the subject acres. (D.I. 368) Plaintiff has failed to provide sufficient evidence to show that defendant abused his discretion in making this determination. The court finds no evidence that defendant acted arbitrarily in denying plaintiff's enrollment in the CRP because the land consisted of existing waterways.

VI. CONCLUSION

For the reasons stated above, the court shall grant defendant's motion and deny plaintiff's motion. An appropriate order shall issue.

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Plaintiff,	)	
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	)	
Defendant.	)	

O R D E R

At Wilmington this 26th day of March, 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiff's motion for summary judgment (D.I. 16) is denied.

2. Defendant's cross-motion for summary judgment (D.I. 19) is granted.

3. The Clerk is directed to enter judgment against plaintiff and in favor of defendant.

Sue L. Robinson
United States District Judge